FILED

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OFFICE OF THE CLERK

No.

In The

Supreme Court

of the

United States

October Term, 1998

SYLVESTER MOTT,

Petitioner,

vs.

KENNY ROBINSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I

WHETHER THE FAILURE TO AFFORD THE PETITIONER A HEARING ON THE ISSUE OF EQUITABLE TOLLING OF THE LIMITATIONS PERIOD OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 CONSTITUTES A VIOLATION OF DUE PROCESS

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Petititoner, Sylvester Mott, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, issued on March 17, 1999 and affirmed after a motion for rehearing on April 30, 1999.

OPINIONS BELOW

The Order of the Court of Appeals for the Sixth Circuit denying the Petitioner's Request for a Certificate of Appealability was not published, but is attached hereto as Appendix 1. The Sixth Circuit's Order denying Petitioner's Motion for Rehearing was not published but is attached hereto as Appendix 2.

The District Court's Order denying the Petition for Writ of Habeas Corpus was not published but is attached as Appendix 3. It is

based on the adoption of the Magistrate's Report and Recommendation, attached as Appendix 4.

JURISDICTION

The Sixth Circuit's order denying Petitioner's Request for Certificate of Appealability was entered on March 17, 1999. Petitioner filed a timely Motion for Rehearing on or about March 30, 1999, which was denied by the Sixth Circuit on April 30, 1999. This petition for a writ of certiorari has been filed and docketed within the time prescribed. Jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1291 and Supreme Court Rules 12 and 13.

CONSTITUTIONAL PROVISIONS INVOLVED

US Const, Am V provides in pertinent part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

US Const, Art I, Section 9 provides in part:

"No Bill of Attainder or ex post facts Law shall be passed."

STATEMENT OF THE CASE

Petitioner Sylvester Mott is a state prisoner confined at the Ryan Correctional Facility in Detroit, Michigan, serving a term of 75-150 years.

Mr. Mott was convicted of 2nd degree murder on October 19, 1983 in Detroit Recorders Court and sentenced on October 27, 1983.

With the assistance of counsel, petitioner appealed his conviction to the Michigan Court of Appeals. On January 23, 1985, the Court of Appeals affirmed the conviction.

Petitioner thereafter appealed to the Michigan Supreme Court, which denied his application for leave to appeal on August 28, 1985.

On September 11, 1989, Mr. Mott filed a motion for new trial and resentencing, which was denied on September 25, 1989.

The Michigan Court of Appeals denied petitioner's application for leave to appeal from the denial of said motion on February 5, 1990. On October 29, 1990, the Michigan Supreme Court denied Mr. Mott's application for leave to appeal therefrom because the Court was not persuaded that the questions presented should be reviewed.

With the assistance of Attorney Carla J. Johnson, Sylvester Mott filed a motion for relief from judgment in the trial Court pursuant to MCR 6.500-.509, which was denied on May 24, 1994.

On November 2, 1994, the Michigan Court of Appeals denied petitioner's application for leave to appeal from the denial of his motion for relief from judgment. The Michigan Supreme Court denied his application for leave on June 30, 1995, stating the Defendant had

failed to meet the burden of establishing entitlement to relief under Michigan Court Rule ("MCR") 6.508(D).

On August 6, 1997, petitioner filed his petition in pro se for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, Southern Division, raising eight issues:

(1) Whether petitioner was denied Due Process, where the evidence was insufficient to establish all the essential elements of the crime charged;

(2) Whether admission of photographic evidence denied petitioner a fair trial;

(3) Whether the failure to direct a verdict of acquittal on a first-degree murder charge when premeditation was not established violated petitioner's Due Process rights;

(4) Whether trial and appellate counsel were so deficient as to violate petitioner's right to the effective assistance of counsel;

(5) Whether sentencing of 75-100 years imprisonment impermissibly precludes petitioner from his statutory right of parole;

(6) Whether jury instructions were so erroneous as to deny Due Process;

(7) Whether prosecutorial misconduct denied petitioner a fair trial;

(8) Whether petitioner was denied a fair trial by the failure of the trial court to give an instruction on manslaughter.

At the time of filing his in pro se petition, Mr. Mott had no idea that the provisions of the recently enacted Antiterrorist and Effective Death Penalty Act ("AEDPA") had any application to his case whatsoever for the reason that his conviction and subsequent pursuit of post-conviction remedies had all occurred prior to the Act's passage on April 24, 1996. In fact, a Memorandum from National Legal Professional Associates (Appendix 5) was circulated within the Michigan Correctional Facilities' System which specifically advised inmates that

> "After much research, it is [sic] position of NLPA that the

> one year limitation period and the requirement of certificate of appealability amendments do not apply to those individuals convicted before April 24, 1996. To apply these amendments to such individuals is a violation of Ex Post Facto clause of the constitution. Thus, we believe that for individuals who were convicted before the [sic] April 24, 1996 and who still want to file a Section 2255 motion, there is no time limitation on when their Section 2255 motion can be filed. Several Court of Appeals have already affirmed this position. We have little doubt that ultimately this matter will be resolved by the United States Supreme Court permitting individuals convicted before April 24, 1996 to file their post-conviction motions and not be adversely effected by the one year filing deadline. For those individuals who were convicted after April 24, 1996, the one year filing deadline does apply . . ." (first emphasis original; subsequent emphasis added).

Consequently, rather than having any information that would have led Mr. Mott to believe the AEDPA might apply to him, he was led to believe exactly the opposite was true.

Respondent filed a motion on October 15, 1997 seeking dismissal of

the petition on the basis of the newly enacted one year statute of limitations period established by the AEDPA on April 24, 1996 (now 28 USC Section 2244(d)).

Petitioner filed an answer thereto on December 19, 1997, raising the following issues as characterized by the Magistrate below:

I. WHETHER AEDPA APPLIES TO HIS NON-CAPITAL PETITION FOR WRIT OF HABEAS CORPUS.

II. IF SO, WHETHER THE FOLLOWING ISSUES SUFFICIENTLY AMOUNT TO EXTRAORDINARY CIRCUMSTANCES BEYOND HIS CONTROL WHICH PREVENTED HIS TIMELY FILING:

A. WHETHER HIS PRO SE STATUS AND LACK OF LEGAL KNOWLEDGE IS SUFFICIENT TO JUSTIFY THE EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS;

B. WHETHER HE HAD A REASONABLE OPPORTUNITY TO BRING THE SUIT FOLLOWING THE ENACTMENT OF AEDPA IN ORDER TO JUSTIFY EQUITABLE TOLLING.

III. REGARDLESS OF AEDPA AND 28 U.S.C. Section 2254(d), WHETHER HIS ISSUES HAVE MERIT THAT MAKE HIS IMPRISONMENT UNCONSTITUTIONAL AND MANIFESTLY UNJUST, THEREBY REQUIRING HABEAS REVIEW.

The District Court recognized that the Courts have not applied the new 1-year statute of limitations in a fully retroactive manner to petitions for habeas relief where direct review had already been completed a year or more prior to the AEDPA's enactment and have instead afforded habeas petitioners a one-year grace period in which to file the petition, i.e. until April 24, 1997. The lower court additionally noted that the AEDPA was not jurisdictional, but instead simply set a new statute of limitations which was subject to equitable tolling (Appendix 4, Magistrate's 4/24/98 Report and Recommendation, pp 5-6).

The District Court concluded that because petitioner completed direct review of his conviction over one year, prior to the enactment of the AEDPA, the period of limitations

for him to commence the instant action expired on April 24, 1997 (Appendix 4, 4/24/98 Report, pp 6-7).

Despite the fact that Mr. Mott's petition was filed only 104 days after the deadline found to be applicable by the Magistrate below, the District Court gave very little consideration to the issue of whether the limitations period should be equitably tolled beyond that date. As previously set forth in Petitioner's Application, the District Court erroneously concluded (by adoption of the Magistrate's report in its May 22, 1998 Order, Appendix 3) that Mr. Mott had not pointed to any facts, other than his pro se status and lack of legal knowledge (Appendix 4, 4/24/98 report, p 9) which would justify an equitable tolling of the limitations period.

Mr. Mott did not receive the Magistrate's report until May 11, 1998 (See Appendix 6, the 1st attachment to Petitioners Objection to the Magistrate Report and Recommendation). On May 18, 1998, Mott filed timely objections to the conclusions of the report, and raised the following significant factors for consideration with regard to the tolling issue, in addition to his pro se status and lack of knowledge of the change in the limitations period:

(1) Mr. Mott's attorney, Carla J. Johnson, was in the process of moving to California on or about 3/24/97 and did not even send him the trial transcripts which were necessary to prepare his petition for writ of habeas until 3/24/97. Since at least five of the issues Mr. Mott eventually raised in his petition clearly required reference to the transcript to support his contentions, it would have been grossly unreasonable under the best of circumstances to expect him to have filed his petition by April 24, 1997;

(2) Mr. Mott's access to the correctional facilities' law libraries was limited to six hours per week (while the directive

attached to Mott's 5/18/98 Objections provides that inmates shall be entitled to at least six hours per week of law library use, the proofs will show that in practice, the particular Michigan Correctional facilities having custody of the petitioner provided only six hours per week of use).

After the filing of his 7/9/98 Request for Issuance of Certificate of Appealability under FRAP 22(b), Mr. Mott undertook to ascertain the exact date on which he had received his trial transcripts and begun preparing his petition in this cause. Attached hereto collectively under Appendix 7 are several documents, including a copy of the 3/24/97 letter from former counsel Carla J. Johnson, November 12, 1998 letter from Mr. Mott to the Mail Room Supervisor at the Gus Harrison Correctional Facility in Adrian, Michigan, December 6, 1998 Memorandum from Captain Stevens of the Michigan Department of Corrections to Mr. Mott and 2/16/99 letter from Mr. Mott to

the Mail Room Supervisor at the Mound Road Correctional Facility containing a return notation.

These documents unequivocally establish that the Petitioner did not actually receive his trial transcripts until 3/26/97, a mere 29 days before the so-called "one-year grace period" would bar his petition under the AEDPA. Preparing an adequate, competent petition for writ of habeas corpus under such time constraints would have been virtually impossible in light of Mr. Mott's pro se status, the need to review the transcripts themselves and to conduct the necessary research within the mere six hours per week of time allotted for his use of the law library. Under the circumstances, the fact that Mott's petition was filed only 104 days late indicates a devoted, diligent effort was made on

his part to file same with no undue delay.

On March 17, 1999, the Sixth Circuit denied the Petitioner's Request for Issuance of Certificate of Appealability.

Petitioner thereafter filed a timely Motion for Rehearing on or about March 30, 1999, which included the documents collectively comprising Appendix 7, as well as the affidavit of the Petitioner (Appendix 8). Said motion for rehearing was denied on April 30, 1999. (Appendix 2). Petitioner now seeks a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I

FAILURE TO AFFORD THE PETITIONER A HEARING ON THE ISSUE OF THE EQUITABLE TOLLING OF THE AEDPA LIMITATIONS PERIOD UNDER THE CIRCUMSTANCES OF HIS CASE WOULD CONSTITUTE A VIOLATION OF DUE PROCESS

As noted in Calderon v. U.S. Dist. Court for Central District of

Cal., 128 F3d 1283 (CA 9 1997), state prisoners had almost unfettered discretion in deciding when to file a federal habeas petition prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The only pre-AEDPA limit was imposed by Rule 9(a) of the Rules Governing Section 2254 cases in the United States District Courts, which allowed dismissal of the petition if it appeared the state had been prejudiced in its ability to respond to the petition by delay in filing. Lindh v. Murphy, 96 F3d 856 (CA 7 1996); rev'd on other grounds 117 S Ct 2059 noted that a prisoner could wait a decade without transgressing Rule 9(a), citing Lanchar v. Thomas, ____ US ____; 116 S Ct 1293; 134 Led 2d 440 (1996). A prisoner's decision to defer filing might await the outcome of his legal research or the Supreme court's decision on a case

that could influence the selection of issues. The AEDPA dramatically changed the leisurely pace at which petitions might be prepared by shortening the time for filing a federal habeas petition to one year, 28 USC Section 2244(d).

Pertinent provisions of the Act are as follows:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of ---
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

The AEDPA limitation period is merely that - it is not jurisdictional. Calderon, supra, at 128 F3d 1288; Parker v. Bowersox, 975 F Supp 1251 (WD Mo 1997). See also Zipes v. Trans World Airlines, Inc.,

455 US 385, 394; 102 S Ct 1127, 1133; 71 Led 2d 234 (1982).

However,

" . . . [A]ll statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the Courts. A statute could not bar the existing rights of claimants without affording this opportunity if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily . . . It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action . . . [Where the time allowed is so manifestly insufficient that it fails in this respect] the statute becomes a denial of justice," Texaco, Inc. v. Short, 454 US 516, 527, R 21.

In Landsgraf v. USI Film Products, 511 US 244; 114 S Ct 1483; 128 Led 2d 229 (1994), the Court noted that a statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date. Retroactive legislation presents problems of unfairness that

are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions. In a passage that could easily have been written for the case at bar, Landgraf emphasized that

> "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted . . .
>
> The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause may not suffice to warrant its retroactive application.
>
> These provisions demonstrate that retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals" (at 128 Led 2d 252-253).

Landgraf also recognized that a statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating its enactment or upsets expectations based on prior law. Rather, "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment" (at 128 Led 2d 254-255).

There has been no doubt that the AEDPA does indeed attach new legal consequences to prisoners contemplating or preparing petitions for federal habeas writs where state review of their convictions has been exhausted prior to the AEDPA's enactment. See Calderon, supra (prisoners whose year had elapsed prior to the AEDPA's enactment would be altogether barred from filing petitions; those who had some days remaining before the year elapsed

would face dire consequences for having wasted the time prior to the enactment, often in the form of unreasonable time constraints for the investigation, preparation and filing of the petition); U.S. v. Lopez, 100 F3d 113 (CA 10 1996) (retroactive application of the one-year requirement of filing a Section 2255 motion would be inconsistent with Landgraf); Peterson v. Demskie, 107 F3d 92 (CA 2 1997); Burns v. Morton, 970 F Supp 373 (D NJ 1997); Reyes v. Keane, 90 F3d 676 (1996).

In Lindh v. Murphy, 96 F3d 856 (CA 7, 1996), the Seventh Circuit recognized that the AEDPA might readily and impermissibly attach new legal consequences to a prisoner's decision to delay his filing for habeas relief:

> "There remains a possibility that application of the 1996 Act could "attach new legal consequences" to events other than the crime and the

state's legal processes and judgment. Consider, for example, how the filing deadline in Section 101 of the 1996 Act applies to existing judgments. Under the new statute, 28 U.S.C. Section 2244(d), a petitioner has only one year from the completion of direct review to commence a collateral attack; there was no corresponding limit in prior law, although Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts established an amorphous standard linked to prejudice to the state. A prisoner could wait a decade without transgressing Rule 9(a). See *Lonchar* v. *Thomas*, ___ U.S. ___, 116 S. Ct. 1293, 134 L.Ed.2d 440 (1996). Lindh got his collateral attack under way less than a year after the Supreme Court of Wisconsin decided his case. But suppose he had waited two years, filing in 1993 rather than 1992. Would we now apply Section 2244(d) and dismiss the petition? Not at all. A prisoner's decision to defer filing - perhaps while doing legal research, or while waiting for the Supreme Court to decide a case that could influence the selection of issues - is the sort of event to which the amended statute would "attach new legal consequences." Courts treat a reduction in the statute of limitations as a rule for new cases only. See *Landgraf*, 511 U.S. at ___ n. 29, 114 S. Ct. at 1502 n. 29. And although no decision of the Supreme Court addresses the question directly, we do not

> doubt that the Court would give a plaintiff who files after the enactment a reasonable post-amendment time to get litigation underway." (at 96 F3d 865-866).

Consequently, most of the circuits considering the question have responded to the retroactivity problem by ruling that the AEDPA's one-year limitation period did not even begin to run prior to the AEDPA's date of enactment, thus formulating a one-year grace period of until 4/24/97 to file a federal habeas petition. Calderon, supra; Burns, supra; Lindh, supra. As Reyes stated:

> "There is no indication that Congress wished to cut off access to federal courts by state prisoners who lacked notice of the new limitations period" (at 90 F3d 679).

However, analysis of the AEDPA's retroactive effects and formulation of the one-year grace period was a process which made its impact through decisions issued in the latter half of 1996 and early 1997. The late

metamorphosis of the grace period itself made elimination of the retroactivity concerns impossible in cases like that of your petitioner here, who became aware of it too late, and who had been led to believe the AEDPA had no application to their cases. In such cases, the doctrine of equitable tolling should be, if not liberally applied, at least given very careful consideration in order to avoid a retroactive application of the AEDPA which violates Due Process.

As noted above, the AEDPA's one-year limitation period is not jurisdictional and is therefore subject to equitable tolling, Calderon, supra; Parker v. Bowersox, 975 F Supp 1251 (WD Mo 1997); Zipes, supra; United States v. Locke, 471 US 84; 105 S Ct 1785; 85 Led 2d 64 (1985) (statutory filing deadlines are generally subject to the defenses of waiver, estoppel and equitable

tolling). While Calderon proposed an "extraordinary circumstances" test to determine the propriety of tolling, that is not the test applied in the Sixth Circuit. Under Wright v. State of Tenn., 628 F2d 949 (CA 6 1980); Rose v. Dole, 945 F2d 1331 (CA 6 1991); Andrews v. Orr, 851 F2d 146 (CA 6 1988) and LaCroix v. Detroit Edison Co., 964 F Supp 144 (ED MI 1996), some of the factors to be considered regarding the question of tolling are:

> (1) Lack of actual notice of the filing requirement;
>
> (2) Lack of constructive knowledge of the filing requirement;
>
> (3) Diligence in pursuing one's rights;
>
> (4) Absence of prejudice to the Defendant; and
>
> (5) Plaintiff's reasonableness in remaining ignorant of the notice requirement.

In Fagan v. Washington, 942 F2d US (CA 7 1991), the 7th Circuit

recognized even before the AEDPA's enactment that "the law of habeas corpus is subtle and intricate; mistakes are easy to make" (at p 1157). Consequently, factors additional to those set forth in Wright and its progeny which the undersigned believes are entitled to consideration concerning the tolling issue are the departure of the petitioner's legal counsel, Calderon, supra; and the fact that the petition is often initiated by laymen, unassisted by counsel, due to financial considerations - see Morgan v. Washington Mfg. Co., 660 F2d 710 (CA 6 1981). While the Magistrate below asserted that Mr. Mott's pro se status and lack of legal knowledge did not justify equitable relief in the form of tolling of 28 USC Section 2244(d), Courts have concluded otherwise with respect to the analogous issue of abuse of the writ.

See Nell v. James, 811 F2d 100 (CA 2 1987) and Gunn v. Newsome, 881 F2d 949 (CA 11 1989). Gunn stated in pertinent part that:

"Mindful that 'the importance of the writ necessitates that it not lose its effectiveness in a procedural morass' [citation omitted] and mindful of the fairness implicit in equitable doctrine, we reject the state's argument [that pro se petitioners be held to a higher standard] . . . Pro se habeas petitioners do not stand in the same position as counseled petitioners. Because habeas petitioners 'are often unlearned in the law and unfamiliar with the complicated rules of pleading' we do not 'impose on them the same high standards of the legal act which we might place on the members of the legal profession . . .'

It is entirely inconsistent with . . . equitable principles . . . to suggest that courts should impute the knowledge of a lawyer to a pro se petitioner" (at 881 F2d 960-961).

Under Wright, supra, at 628 F2d 953, Mr. Mott should have been afforded a full opportunity to be heard on the issue of equitable tolling. Since the District Court failed to do so, it is impossible to make a complete argument in this respect on his behalf. However, his

lack of actual notice of the AEDPA's one-year limitation period and the grace period subsequently carved out by the federal courts is obvious. There is also no indication in the limited record that is available that Sylvester Mott had constructive knowledge of same. The NLPA Memorandum (Appendix 5) instead indicates Mr. Mott was led to believe the newly enacted AEDPA had no application to his case at all. That he was diligent in pursuing his rights is demonstrated by the fact that he did not even receive the trial transcripts from his former counsel as she prepared to depart for California until 3/26/97 (Appendix 7); yet he was able to investigate, prepare and file his petition merely 104 days after the so-called "grace period" expired on 4/24/97. The respondent can hardly demonstrate any actual prejudice by said 104-day

delay, and the reasonableness of Mr. Mott's ignorance of the 4/24/97 deadline that was eventually created by consensus in the federal court system should be considered well-established by the fact that the consensus did not even come about until late 1996 to early 1997. Certainly, support for his position would be difficult to garner if the events at issue - enactment of the AEDPA and federal consideration of its retroactive effects - had transpired several years earlier. But where the Court seeks to hold him to a deadline that was anything but clear until just a few short months before it expired, it is readily apparent that to enforce same against him would constitute a denial of Due Process.

CONCLUSION

The Petitioner requests that this Honorable Court reverse the decisions of the Court of Appeals and the District Court and order that an evidentiary hearing be held on the issue of the equitable tolling of the limitations period for the filing of his petition for a writ of habeas corpus.

Respectfully Submitted,

BY: Mark R. Granzotto
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(313) 964-4720

Dated: July 29, 1999

No.

In The

Supreme Court

of the

United States

October Term, 1998

SYLVESTER MOTT,

Petitioner,

vs.

KENNY ROBINSON,

Respondent.

CERTIFICATE OF SERVICE

I do hereby certify that three true copies of the foregoing was sent this 29th day of July, 1999 by regular U.S. mail with sufficient postage affixed to the office of:

Jeffrey W. Caminsky, Esq.
1204 Frank Murphy Hall
of Justice
Detroit, MI 48226

Submitted,

BY:_____
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Counsel for Petitioner

APPENDIX 1

No. 98-1729

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

		FILED
SYLVESTER MOTT,	)	
	)	MAR 17 1999
Petitioner-Appellant,	)	
	)	LEONARD
	)	GREEN, Clerk
v.	)	
	)	
KENNY ROBINSON,	)	ORDER
	)	
Respondent-Appellee.	)	
	)	

Before: MARTIN, Chief Judge

Sylvester Mott appeals a district court decision dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. Section 2254. Mott has requested a certificate of appealability from this court.

Upon review, the application for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

/s/
Clerk

APPENDIX 2

No. 98-1729

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

	FILED
SYLVESTER MOTT,	
	APR 30 1999
Petitioner-Appellant,	
v.	LEONARD GREEN, Clerk
KENNY ROBINSON,	ORDER
Respondent-Appellee.	

Before: KENNEDY, SILER, and MOORE, Circuit Judges.

Sylvester Mott petitions for rehearing of this court's order denying his application for a certificate of appealability in this habeas corpus action filed pursuant to 28 U.S.C. Section 2254. Upon review, we conclude that the petition for rehearing lacks merit. Fed. R. App. P. 40(a). The petition for habeas corpus relief is barred by the

applicable statute of limitations. 28 U.S.C. Section 2244(d)(1).

Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/
Clerk

APPENDIX 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SYLVESTER MOTT,

Petitioner, No. 97-73959

v. Hon. John Corbett O'Meara

KENNY ROBINSON,

Respondent.
_____/

ORDER ACCEPTING MAGISTRATE JUDGE KOMIVES' SEPTEMBER 11, 1998 REPORT AND RECOMMENDATION

The court, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, 28 U.S.C. Section 636(b)(1)(B), and LR 72.1(d)(2)(E.D. Mich. Dec. 6, 1993), has reviewed Magistrate Judge Komives' September 11, 1998 report and recommendation. No objections were filed. After conducting a *de novo* review, the court accepts the magistrate judge's report and recommendation as the court's findings and conclusions.

Accordingly, it is hereby -

ORDERED that Magistrate Judge Komives' September 11, 1998 report and recommendation is **ADOPTED.**

It is further **ORDERED** that Petitioner's request/motion for issuance of a certificate of appealability is **DENIED.**

/s/
John Corbett O'Meara
United States District Judge

Dated: OCT 20 1998

What hearing is the judge talking about, and what was the Magistrate findings, ect?

APPENDIX 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SYLVESTER MOTT,

Petitioner, CIVIL ACTION

v. No. 97-CV 73959-DT

KENNY ROBINSON,

Respondent. JUDGE JOHN CORBETT O'MEARA

MAGISTRATE JUDGE PAUL KOMIVES

_____/

REPORT AND RECOMMENDATION

I. RECOMMENDATION

Petitioner's application for the writ of habeas corpus is barred by the one-year statute of limitations imposed by 28 U.S.C. Section 2244(d). Accordingly, the Court should deny the application.

II. REPORT

A. *Procedural History*

1. Petitioner Sylvester Mott is a state prisoner currently confined at the Carson City Correctional Facility in Carson City, Michigan.

2. On October 19, 1983, a Detroit Recorders Court jury convicted petitioner of second degree murder in the brutal beating death of three year old Jaffira Reed, under M.C.L.A. 750.317, which carries a life sentence or imprisonment for any term of years, at the discretion of the court. On October 27, 1983, Recorder's Court Judge Leonard Townsend sentenced petitioner to 75 to 100 years in prison.

3. Petitioner, with the assistance of appointed counsel, appealed his conviction to the Michigan Court of Appeals, claiming trial counsel rendered ineffective assistance by failing to request an alibi instruction. On January 23,

1985, the court of appeals affirmed the conviction in a published opinion. *See People v. Mott*, 140 Mich. App. 289 (1985).

4. Petitioner appealed to the Michigan Supreme Court. On August 28, 1985, the Court denied his application for leave to appeal.

5. On September 11, 1989, petitioner filed a motion for a new trial and resentencing at the Detroit Recorders Court, claiming (1) improper jury instructions involving intent, (2) inadmissible photographic evidence, (3) prosecutorial misconduct, (3) error in not including a jury instruction for manslaughter, and (4) ineffective assistance of counsel. The trial court denied his motion on September 25, 1989.

6. On February 5, 1990, the Michigan Court of Appeals denied petitioner's application for leave to

appeal from the denial of his motion for a new trial for lack of merit in the grounds presented. On October 29, 1990, the Michigan Supreme Court denied petitioner's application for leave to appeal because the Court was not persuaded that the questions presented should be reviewed.

7. In May 1994, petitioner filed a motion for relief from judgment in the trial court pursuant to M.C.R. 6.500-.509, claiming (1) improper jury instructions, (2) prosecutorial misconduct, and (3) ineffective assistance of counsel at trial and at appeal. The trial court denied his motion on May 24, 1994. The trial court was not convinced there were any errors that would warrant a new trial.

8. On November 2, 1994, the Michigan Court of Appeals denied petitioner's application for leave to appeal from the denial of his motion

for relief from judgment, saying he had failed to establish any grounds cognizable under M.C.R. 6.508(D). On June 30, 1995, the Michigan Supreme Court denied petitioner's application for leave on the same grounds.

9. On August 6, 1997, petitioner filed his petition for the writ of habeas corpus in this court, raising the following seven issues:

I. WHETHER SUFFICIENT EVIDENCE EXISTED TO CONVICT HIM OF SECOND-DEGREE MURDER.

II. WHETHER FAILURE TO SUPPRESS PHOTOGRAPHIC EVIDENCE OF THE DECEASED CHILD VIOLATED HIS DUE PROCESS RIGHTS.

III. WHETHER FAILURE TO DIRECT A VERDICT OF ACQUITTAL ON A FIRST-DEGREE MURDER CHARGE WHEN PREMEDITATION WAS NOT ESTABLISHED VIOLATED HIS DUE PROCESS RIGHTS.

IV. WHETHER TRIAL AND APPELLATE COUNSEL WERE SO DEFICIENT AS TO VIOLATE HIS CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL.

V. WHETHER SENTENCING OF 75-100 YEARS IMPRISONMENT IMPERMISSIBLY PRECLUDES HIM FROM HIS STATUTORY RIGHT OF PAROLE.

VI. WHETHER JURY INSTRUCTIONS WERE SO ERRONEOUS AS TO DENY HIM DUE PROCESS.

VII. WHETHER PROSECUTOR CONDUCT AT TRIAL WAS SO IMPROPER SO AS TO DENY HIM A FAIR TRIAL.

10. On October 15, 1997, respondent filed a motion seeking dismissal pursuant to the newly enacted one year statutory limitation for filing petitions for habeas review now found in 28 U.S.C. Section 2244(d). On November 17, 1997, a respondent answered the petition for writ of habeas corpus. Respondent asserts that (1) the petition is barred by the one year limitation of 28 U.S.C. 2244(d) because of his failure to file by April 24, 1997; (2) petitioner's claims have been procedurally defaulted; and (3) petitioner's claims are without merit.

11. On December 19, 1997, petitioner filed his answer to respondent's motion, raising the following issues:

I. WHETHER AEDPA APPLIES TO HIS NON-CAPITAL PETITION FOR WRIT OF HABEAS CORPUS.

II. IF SO, WHETHER THE FOLLOWING ISSUES SUFFICIENTLY AMOUNT TO EXTRAORDINARY CIRCUMSTANCES BEYOND HIS CONTROL WHICH PREVENTED HIS TIMELY FILING:

A. WHETHER HIS PRO SE STATUS AND LACK OF LEGAL KNOWLEDGE IS SUFFICIENT TO JUSTIFY THE EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS;

B. WHETHER HE HAD A REASONABLE OPPORTUNITY TO BRING THE SUIT FOLLOWING THE ENACTMENT OF AEDPA IN ORDER TO JUSTIFY EQUITABLE TOLLING.

III. REGARDLESS OF AEDPA AND 28 U.S.C. Section 2254(d), WHETHER HIS ISSUES HAVE MERIT THAT MAKE HIS IMPRISONMENT UNCONSTITUTIONAL AND MANIFESTLY UNJUST, THEREBY REQUIRING HABEAS REVIEW.

B. *Legal Standard for Habeas Review of Petitions Subject to the One Year Statute of Limitations of 28 U.S.C. Section 2244.*

AEDPA was signed into law on April 24, 1996. It enacted the present 28 U.S.C.A. Section 2254(d). AEDPA expresses Congress' intent to require prisoners to act expeditiously to take advantage of federal habeas review. Congress has added a one-year statute of

limitations to 28 U.S.C. Section 2244. Several methods are listed by which to measure this one year period:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
(A) the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review;
(B) the date on which the impediment to filing an application created by the State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action:
(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. Section 2244(d).

The courts have not applied this one year statute of limitations in a fully retroactive manner to petitions for habeas relief where direct review had already been completed a year or more prior to the AEDPA's enactment. Instead, the courts have afforded habeas petitioners a grace period of one year from AEDPA's date of enactment within which to file the petition, i.e., up to and including April 24, 1997. *See Calderon v. U.S. Dist. Ct. for the Cent. Dist. Of Cal.*, 112 F.3d 386, 389 (9th Cir. 1997) (the one-year time limit for habeas petitions did not begin to run against any state prisoner prior to April 24, 1996); *Reyes v. Keane*, 90 F.3d 676, 679 (2d Cir. 1996) (retroactivity of time limit to cases pending prior to enactment would be entirely unfair and severe). *But cf., Peterson v. Demskie*, 107 F.3d 92, 93 (2d Cir. 1997) ("in

circumstances . . . where a petitioner has had several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year after the effective date of the AEDPA.").

In addition, some courts have suggested that AEDPA's one-year (period of limitation" is subject to equitable tolling and is not a jurisdictional bar. *See Calderon 112 F.3d at 391; see also, Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982) (a statute's plain language will determine the court's discretion in adjudicating the statute when it "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts."); *United States v. Locke*, 471 U.S. 84, 94 n. 10 (1985) ("Statutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable

tolling."). Equitable tolling is possible if "extraordinary circumstances" beyond a prisoner's control make it impossible to file a petition on time, thereby justifying tolling. *See Calderon, 112 F.3d. at 391.*

C. *Whether Petitioner's Application for Writ of Habeas Corpus is Barred by the One-Year Statute of Limitations.*

Petitioner has not shown that the state impeded has timely filing. Nor has he asserted a newly recognized constitutional right or a newly discovered factual predicate. 28 U.S.C. Section 2244(d)(1)(B), (C), and (D). Accordingly, the date on which the judgment of conviction became final by conclusion of direct review or expiration of the time for seeking such review under 28 U.S.C. Section 2244(d)(1)(A) constitutes the applicable last date from which the period of limitations ran. The time

to seek direct review of the challenged convictions in the instant case expired 90 days after the Michigan Supreme Court denied petitioner's application for leave to appeal on August 28, 1985, when the time lapsed to seek a writ of certiorari in the United States Supreme Court. U.S. Supreme Court Rule 13. Because petitioner completed direct review of the challenged convictions over one year prior to the enactment of the AEDPA, the period of limitations for petitioner to commence the instant action expired on April 24, 1997. *See Calderon, 112 F.3d at 389.* While the period during which a "properly filed application for state post-conviction or other collateral review"[1] was pending should be excluded from this calculation, this

[1] *See* 28 U.S.C. Section 2244(d)(2) herein.

does not affect the conclusion here expressed.

Petitioner filed his petition on August 6, 1997, well after the statutory filing deadline (as calculated above) of April 24, 1997. Accordingly, his petition is time-barred by 28 U.S.C. Section 2244(d) unless he shows the existence of extraordinary circumstances beyond his control which prevented his timely filing, thus qualifying for an equitable tolling of the statute of limitations.

D. *Whether Petitioner Has Established the Existence of Extraordinary Circumstances.*

1. *Pro Se Status and Lack of Legal Knowledge*

Petitioner asserts that his pro se status and lack of legal knowledge collectively amount to an extraordinary circumstance that justifies the equitable tolling of the statute of limitations. A

majority of the courts of appeals have rejected similar arguments, however, in the context of procedural default and abuse of the writ. *See Lewis v. United States*, No. 96-3092, 1997 WL 49028, at *3 (6th Cir. Feb. 4, 1997) (per curiam); *see also, Haley v. United States*, 78 F.3d 282, 285 (7th Cir. 1996); *McCowin v. Scott*, 67 F.3d 100, 101-02, (5th Cir. 1995); *Charron v. Gammon*, 69 F.3d 851, 859 (8th Cir. 1995); *George v. Perrill*, 62 F.3d 333, 335 (10th Cir. 1995); *Huston v. Gomez*, No. 94-55005, 1994 WL 594704, at *2 (9th Cir. Oct. 31, 1994); *Whittemore v. United States*, 986 F.2d 575, 579 (1st Cir. 1993); *Rodriquez v. Maynard*, 948 F.2d 684, 688 (10th Cir. 1991) ("[Petitioner's] pro se status and his corresponding lack of awareness and training on legal issues do not constitute adequate cause for his failure to

file [his] new claims in his previous habeas petition.")[2]

Further, courts have rejected this argument with respect to other statute of limitation provisions. *See Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991); *School Dist. Of City of Allentown v. Marshall*, 657 F.2d 16, 21 (3rd Cir. 1981) ("ignorance of the law is not enough to invoke equitable tolling."); *LaCroix v. Detroit Edison Co.*, 964 F. Supp. 1144, 1149 (E.D. Mich. 1996). Accordingly, the Court should conclude that petitioner's claim of pro se status and lack of legal knowledge does not amount to an extraordinary circumstance which justifies the equitable tolling of 28 U.S.C. Section 2244(d).

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[2] Only the Second and Eleventh Circuits have reached a contrary result. *See Nell v. James*, 811 F.2d 100, 105 (2d Cir. 1987); *Gunn v. Newsome*, 881 F.2d 949, 961-62 (11th Cir. 1989). Both of these decisions pre-date *McCleskey v. Zant*, 499 U.S. 467, 493 (1991), however, where the Supreme Court held that the same cause and prejudice standard as used in the procedural default context applies in determining if there has been an abuse of writ through inexcusable neglect. It is unclear whether these courts would reach the same result under *McCleskey*. Additionally, it does not appear that the Third, Fourth, and District of Columbia circuits have addressed this issue with respect to habeas relief.

2. *Reasonable Opportunity to Bring Suit Following the Enactment of AEDPA.*

Petitioner asserts that it would be fundamentally unfair to bar his petition as he did not have a reasonable opportunity to file his petition following the enactment of AEDPA. This claim is without merit. As noted above, the courts have concluded that AEDPA's one year statute of limitations should not be applied in a fully retroactive manner to petitioners who had completed direct review one year or more prior to AEDPA's enactment, but who had not yet filed for habeas relief, like the petitioner in the instant case. The courts gave such habeas petitioners, however, only one year from AEDPA's enactment, until April 24, 1997, within which to file the petition, absent extraordinary circumstances beyond their control which prevented timely filing. Additionally,

petitioner has not pointed to any facts, other than his pro se status and lack of legal knowledge, which explain why it was unreasonable for him to file his petition within this one-year grace period. Accordingly, the Court should conclude that petitioner's allegation of not having a reasonable opportunity to meet the 28 U.S.C. Section 2244(d) statutory filing deadline is without merit and does not justify the equitable tolling of the time limitation.

3. *Meritorious Issues: Unconstitutional Imprisonment*

Finally, petitioner asserts that his issues have merit and demonstrate the unconstitutionality of his imprisonment, thus giving rise to justifiable habeas review. Petitioner, in essence, argues that manifest injustice will result if his petition is barred. With the enactment of the AEDPA, however,

Congress has specifically precluded federal habeas review of applications that are not filed within the statute of limitations imposed by 28 U.S.C. Section 2244(d). In order to justify federal review of his conviction challenge, petitioner must first meet the statutory filing limitations of 28 U.S.C. Section 2244(d)(1). Had Congress intended a fundamental miscarriage of justice exception to apply to the AEDPA statute of limitation provision, "it would have said so in a clear way." *Koon v. United States*, 116 S.Ct. 2035, 2051 (1996) (holding that in deciding whether to depart from the United States Sentencing Guidelines, courts may not supervise the Sentencing Commission's treatment of departure factors because, had Congress intended the courts to exercise such supervisory power, it would have said so explicitly.). Petitioner filed

his petition for the writ of habeas corpus on August 6, 1997, beyond the judicially-created one year grace period after enactment of AEDPA, i.e., April 24, 1997, precluding federal habeas review of his claims. Accordingly, because petitioner has failed to show that extraordinary circumstances justify equitable tolling of the time bar on his application, the Court should conclude that petitioner's writ of habeas corpus is barred by the statute of limitations pursuant to 28 U.S.C. 2244(d)(1).

III. NOTICE TO PARTIES REGARDING OBJECTIONS

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. Section

636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1085); *Howard v. Secretary of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Federation of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed

objections, the opposing party may file a response. The response shall not be more than five (5) pages in length unless by motion and order such page limit is extended b the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

/s/
PAUL J. KOMIVES
UNITED STATES MAGISTRATE JUDGE

Dated: April 24, 1998

APPENDIX 5

NATIONAL LEGAL PROFESSIONAL ASSOCIATES
Case Analysis and Research Division
7 Mariners Cove
Cincinnati, Ohio 45249
Fax (513) 247-9580
Telephone (513) 247-0082

MEMORANDUM

TO: ALL INTERESTED COUNSEL AND THEIR CLIENTS

FROM: NATIONAL LEGAL PROFESSIONAL ASSOCIATES

RE: ANTI-TERRORISM BILL & ITS IMPACT UPON POST-CONVICTION MOTIONS

NAME: ANTI-TERRORISM-UPDATE

As you know, on April 24, 1996, President Clinton signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, 110 Stat. 1214. The focus of this new legislation was to restrict the significant number of habeas corpus motions and death penalty appeals that Congress believes are "clogging up" the judicial system. Accordingly, this new law imposes significant restrictions on a defendant's ability to obtain collateral relief after conviction.

The ramifications of this Act are potentially very detrimental to persons who want to litigate their convictions or collaterally attack their sentences but who have not begun the filing process yet. Additionally, there are many rumors circulating in the prison system concerning this new law which are based upon inaccurate information. Accordingly, NLPA is sending this memorandum to help correct some of the misconceptions and to explain how the new Act impacts upon you and your clients. The following are some of the important sections of the Act of which you should be aware:

Section 105 amends Section 2255 to require that a defendant file his Section 2255 motion within one year from his final judgment date. Further, Section 102 requires a petitioner, who lost at the district court level, to obtain a certificate of appealability - before his appeal will be reviewed by the Court of Appeals. This is significantly different than prior law which permitted the defendant to file a Section 2255 at any time after finalization of their conviction. Also, under prior law, the defendant did not need a Certificate of Appealability - instead the defendant only needed to file a Notice of Appeal.

Unfortunately, these amendments do not specify to which cases these limitations apply. As a result, various district courts and circuit courts have come to differing opinions. However, recent decisions from the Seventh and Tenth Circuit have agreed that the one year limitation does not apply. Lindh v.

Murphy, 96 F3d 856 (7th Cir. 1996); United States v. Lopez, 1996 WL 536582, 60 CrL 1178 (10th Cir. 1996). In Lindh, the Seventh Circuit en banc stated that "a petitioner's decision to defer filing . . . is the sort of event to which the amended statue would attach new legal consequences. Courts treat a reduction in the statute of limitations as a result for new cases only". Additionally, in Lopez, the court found that both the certificate of appealability and the one year limitation of the Act attached new legal requirements to events completed before their enactment and therefore found that neither applied to petitioner. 1996 WL at 1-2.

State habeas corpus petitioners should also be aware of Section 104 which amends Title 28 United State Code Section 2254 to contain a similar one year statue of limitations and bars petitioners from raising ineffective assistance of counsel as a grounds from relief. A recent Second Circuit opinion found that "it would be entirely unfair and a sever instance of retroactivity to apply to Reyes the new [one year] requirement of the [Act]." Reyes v. Keane, 90 F3d 676, 679 (2nd Cir. 1996). However, the Second Circuit left open whether a petitioner would be required to bring a habeas action within a "reasonable time" after the Acts; enactment date.

After much research, it is position of NLPA that the one year limitation period and the requirement of certificate of appealability amendments do not apply to those individuals convicted before April 24, 1996. To apply these amendments

to such individuals is a violation of Ex Post Facto clause of the constitution. Thus, we believe that for individuals who were convicted before the April 24, 1996 and who still want to file a Section 2255 motion, there is no time limitation on when their Section 2255 motion can be filed. Several Court of Appeals have already affirmed this position. We have little doubt that ultimately this matter will be resolved by the United States Supreme Court permitting individuals convicted before April 24, 1996 to file their post-conviction motions and not be adversely effected by the one year filing deadline. For those individuals who were convicted after April 24, 1996, the one year filing deadline does apply. Therefore, if you have a client who has been convicted after April 24, 1996, who wants to pursue post-conviction relief, he must file his post-conviction motion within one year of the date he was sentenced or, if he filed an appeal, within one year from the date that his appeal was denied.

For more than a decade, NLPA has specialized in assisting attorneys in the preparation of post-conviction motions and has experienced an excellent track record in helping its clients obtain results. If you have a client who is interested in pursuing post-conviction relief and would like to have us assist in the research and preparation of the pleadings, contact NLPA.

NLPA, WE CARE, WE LISTEN, WE GET RESULTS!

APPENDIX 6

INTRAMURAL CORRESPONDENCE

Name: MOTT BEY No.162319

Date:5-12-98

Assignment: SCHOOL-TUTOR

Lock: 900-14-B

MAIL FROM SUPERVISOR:

I NEED A LETTER VERIFYING TO JUDGE JOHN CORBETT O'MEARA UNITED STATES DISTRICT COURT THAT I RECEIVED ON MAY 11, 1998 LEGAL MAIL FROM THE CONTACT CENTER OF THE CARSON CITY CORRECTIONAL FACILITY.

THANK YOU VERY MUCH

Mr. Mott,

The Prisoner Legal Mail Receipt does show that you did sign for and receive a mailing from the US District Court on 5/11/98.

Mail Office Supervisor

D. Dutcher

APPENDIX 7

CARLA J. JOHNSON
ATTORNEY AT LAW
3560 PENOBSCOT
645 GRISWOLD
DETROIT, MICHIGAN 48226
(313) 965-6690

March 24, 1997

Sylvester Mott Bey #162319
17601 Mound Road
Detroit, MI 48212

Dear Sir:

I received your letter regarding your transcripts. I am moving to California, so I am enclosing your transcripts. I hope you are successful in winning your habeas action, and I wish you the best of everything.

Sincerely,

/s/

SYLVESTER MOTT BEY 162319
PO Box 5000
Carson City, MI 48811-5000

Mail Room Supervisor (ARF)
2727 E. Beecher St. Nov. 12, 1998
PO Box 1888
Adrian, MI 49221

Dear Supervisor:

I was a prisoner at the Adrian facility from September 1, 1995 to January 8, 1997.

I would like for you to look into your legal receipt records for the Month of October 1996, and November of 1996, and see did I sign for legal transcripts from Carla J. Johnson Attorney at Law, 3560 Penobscot, 645 Griswold, Detroit, MI 48226.

I am currently in the United States Court of appeals for the Sixth Circuit. District Court No. 97-73959, and COA No. 98-1729.

I seek an affirmation from you as the Supervisor as to what does your records show for the purpose of showing the Court.

Please send me your findings as soon as possible. I thank you for your kind courtesy and cooperation.

Sincerely,

/s/

SYLVESTER MOTT Bey

MICHIGAN
DEPARTMENT
OF CORRECTIONS

TO: S. MOTT-BEY 162319
FROM: Capt. R.L. Stevens
DATE: 12-8-98
SUBJECT: LEGAL MAIL

According to our records, you did not receive any legal mail from anyone during the months of October and November of 1996

Lock 9-80 DRF

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SYLVESTER MOTT BEY
162319
17600 Ryan Road
Detroit, MI 48212

Feburary 16, 1999

Ms. Ellen (mail Room Supervisor)
17601 Mound Road
Detroit, MI 48212

Dear Ms. Ellen:

On or about November 12, 1998 I wrote a letter to the mail room supervisor of the Mound facility concerning the exact date in which I signed for legal mail. I in the month of March of feburary of 1997 received legal transcripts from the property room and I thought all mail come or came through your office first, however; I would greatly appreciate you extending to me the exact date I signed for those transcripts. Again, the purpose of this affirmation is to show the court that I did not receive the transcripts in question until Feburary or March of 1997,

My District Court No is 97-73959, and my Circuit Court No is 98-1729 I would appreciate your findings as soon as possible.

I was a prisoner there at the Mound Facility from 1-8-97 to 9-19-97

Thank you for your kind courtesy and cooperation

Sincerely

/s/
SYLVESTER MOTT BEY

APPENDIX 8

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SYLVESTER MOTT,

Petitioner-Appellant,

US District Court No: 97-CV-73959-DT

vs.

KENNY ROBINSON,

Respondent-Appellee,

Court of Appeals No:98-1729

_____/

AFFIDAVIT OF SYLVESTER MOTT

COUNTY OF WAYNE)
)SS
STATE OF MICHIGAN)

SYLVESTER MOTT, being duly sworn, deposes and states as follows:

1. I am the Petitioner-Appellant in the above entitled cause, have personal knowledge of the facts referred to herein and if called to testify, am competent and able to do so.

2. I have had the opportunity to review the Motion for Rehearing filed on my behalf by my attorney, Larry A. Smith, and the facts set

forth therein with regard to the state of my knowledge regarding the application of the Antiterrorist and Effective Death Penalty Act, the receipt of my trial transcripts and the preparation of my Petition for Writ of Habeas Corpus in pro se are true and accurate.

Further Deponent sayeth not.

/s/
SYLVESTER MOTT

Subscribed and Sworn to before me
This 1st day o April, 1999.

/s/
Notary Public, Wayne County, MI
My Commission Expires: JAN. 26, 2002

99-221

FILED
JUN 26 1999
OFFICE OF THE CLERK

IN THE
SUPREME COURTS OF THE UNITED STATES
OCTOBER, 1998

SYLVESTER MOTT,
Petitioner,

vs.

KENNY ROBINSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of the Criminal Division
Research, Training and Appeals

JEFFREY CAMINSKY (P 27258)
Principal Attorney, Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5846

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

I.

MUST A FEDERAL COURT GRANT A HABEAS PETITIONER AN EVIDENTIARY HEARING TO ESTABLISH THE REASON WHY HE FAILED TO MEET THE ONE-YEAR DEADLINE ON SEEKING HABEAS REVIEW CONTAINED IN THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, WHERE THE ONLY EXCUSE OFFERED IS THE PETITIONER'S MISTAKEN ASSUMPTION THAT THE DEADLINE DID NOT APPLY TO HIS CASE?

COUNTERSTATEMENT OF THE CASE

For purposes of the instant Petition only, Respondent accepts Petitioner's statement of the case.

REASONS FOR DENYING THE WRIT

In 1996, seeking the close the loophole which, as Petitioner notes, granted "state prisoners...almost unfettered discretion in deciding when to file a federal habeas petition." (Petitioner's Brief, p 16), Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Among the provisions of the new statute was a one-year limitation on filing a federal habeas petition. 28 USC §2244(d). Under prevailing constructions of the statute, Petitioner had a one-year grace period within which to file his petition following its enactment. *See, eg, Miller v Marr*, 141 F3d 976 (CA 10, 1998); *Calderon v United States*, 112 F3d 386 (CA 9, 1997). Accordingly, he had until April 24, 1997 to file his petition.

As Petitioner acknowledges filing his habeas petition after the deadline, and asserts nothing more than a mistaken assumption that the new deadline did not apply to him to excuse his failure[1], there appears no reason for this Court to review the

---

1 Respondent does not claim that there are no circumstances which would justify an equitable tolling of the limitation: a habeas petitioner who can demonstrate that the State has unfairly impeded his access to the Federal court, for example – or one who has been in a coma – might have a compelling argument that some portion of the time he was disabled from seeking review should be excluded from computing the one-year limitation on seeking habeas relief. However, under existing law, one's ignorance of the law is an excuse only to the admissibility of a confession. *See, eg, Miranda v Arizona*, 384 US 426 (1966). It does not excuse a litigant's failure to meet a procedural hurdle. *See, eg, Rodriquez v Maynard*, 948 F2d 684, 688 (CA 10, 1991); *Whittemore v United States*, 986 F2d 575, 579 (CA 1, 1993); *McGowan v Scott*, 67 F3d 100, 101-102 (CA 5, 1995); *Haley v United States*, 78 F3d 282, 285 (CA 7, 1996).

matter: 28 USC §2244(d) appears to govern the precise legal point at issue; and there appears to be no significant conflict among the Circuits.

RELIEF

WHEREFORE, Respondent prays that this Court deny certiorari in this matter.

John D. O'Hair
Wayne County Prosecuting Attorney

Timothy A. Baughman
Chief of Research, Training, & Appeals

JEFFREY CAMINSKY (P27258)
Assistant Prosecuting Attorney
1204 Frank Murphy Hall of Justice
Detroit, Michigan 48226
Phone: 313-224-5846

Dated: August 18, 1999

JC/eb

J:\PROSCUTR\APPEALS\JCAMINSK\USSC\mott,sylvester,ussc,cert.wpd